No. 15595

United States Court of Appeals

FOR THE NINTH CIRCUIT

GUS LA VERN HILLER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

I.

STATEMENT OF JURISDICTION

Appellant, Gus La Vern Hiller, was indicted in the Western District of Washington, Northern Division, for fifteen alleged violations of Title 18, United States Code, Section 2422. He pleaded guilty to two offenses which were separately charged in Counts IV

and IX of the Indictment. The judgment of conviction directed that he receive consecutive sentences. The present appeal is from a denial of appellant's motion under Title 28, United States Code, Section 2255, for an order vacating the sentence on the second charge. He asserts that there was only one crime and should be but one punishment.

Count IV of the Indictment charged that defendant induced a woman to go from the Northern Division of the Western District of Washington to Dillon, Montana, to engage in the practice of prostitution and thereby caused her to be transported upon the lines of a common carrier in interstate commerce. Count IX made a substantially identical charge with the distinction that a different female was involved and such other person was transported to Nyssa, Oregon.

The District Court of the United States for the Western District of Washington, Northern Division, had jurisdiction of the offenses pursuant to the provisions of Title 18, United States Code, Section 3231. Venue was properly laid in that District Court under the provisions of Rule 18 of the Federal Rules of Criminal Procedure and of Title 18, United States Code, Section 3237.

The jurisdiction of this Court to review the denial of appellant's motion under Title 28, United States Code, Section 2255, is established by the provisions of that section and of Section 2253 of the same title.

There is no printed record on this appeal. The Indictment is paper numbered "1" in the record transmitted to this Court by the Clerk of the District Court and the motion is paper numbered "14" in that record.

II.

SUMMARY OF ARGUMENT

Appellant raises two issues on this appeal (pages 4 - 5 of appellant's brief). Both may be summarized by saying that appellant claims that Counts IV and IX of the Indictment charged the same offense, and the consecutive sentence imposed on the latter count was therefore illegal.

A good part of his argument consists of restatement of matters which he had previously urged upon this Court in other attempts to avoid punishment for the offense charged in Count IX of the Indictment. (See: *Hiller* v. *United States*, 218 F. 2d 641 (1954), the order of this Court filed August 27, 1956 in Miscellaneous No. 403 and the papers filed by appellant in connection with the applications decided by that decision and by that order.)

Appellant's argument that he is guilty of only one offense is premised upon conclusions that a violation of Title 18, United States Code, Section 2422, consists of a course of conduct in persuading one or more women to travel on the lines of common carriers for purposes of prostitution and that actual use of the transportation facilities by the victims is not essential to the crime. Since those basic conclusions are unsound this appeal need not be argued at great length.

Appellant concedes that the women so persuaded by him traveled on separate common carriers to different states but argues that such distinct uses of interstate transportaion facilities are immaterial since his crime was a course of conduct of persuading two women at one time and place.

Appellee takes the position that persuading two women to go to separate states, by different common carriers, for the purpose of prostitution, constitutes two crimes rather than one, even if both women are persuaded at one time and place. The separate use by each woman of the facilities of common carriers in interstate commerce was a necessary part of each crime. It is the acts of improper use of such facilities which are made punishable by the statute. The White Slave Traffic Act does not prohibit or fix a punishment for a course of conduct.

III.

ARGUMENT

Appellant places great stress upon the decisions of the Supreme Court in *Bell* v. *United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955), and *United States* v. *Universal Corporation*, 344 U.S. 218, 73 S.Ct. 227, 97 L.Ed. 260 (1952). He attempts to equate the factual situation in his case with the circumstances considered by the Supreme Court in those cases.

The latter case involved alleged violations of the Fair Labor Standards Act, Title 29, United States Code, Sections 215 and 216(a). The Supreme Court held that those statutes fixed courses of conduct, rather than individual acts, as the units of prosecution.

The *Bell* case also involved the unit of criminal prosecution, but course of conduct was not found to be such a unit. The Court ruled that Title 18, United States Code, Section 2421, did not require or permit more than one punishment for the single act of driving an automobile across a state line, without regard to the number of women who might be in the car when it passed from one state to another.

Appellant contends that *Bell*, like *Universal Corporation*, shows that punishment should be for course of conduct as distinguished from individual acts and

that the law applied to his case should be the same. But course of conduct was not involved in the *Bell* case and is not a factor in the instant case. The Supreme Court held that Bell's act constituted a single transaction in interstate commerce. It did not decide that the White Slave Traffic Act, or any section of it, referred to the course of conduct of an offender. Its ruling was that Bell had been guilty of one infraction of Title 18, United States Code, Section 2421, in making a single trip in interstate commerce with a car containing more than one woman who was being transported for purposes of prostitution. That was a single transaction in interstate commerce. Each such transaction, rather than some vague course of conduct, is the proper unit of prosecution.

In the present case, as in *Bell*, acts, rather than courses of conduct, are to be considered in determining how many separate crimes have been committed. Congress did not have authority to govern the conduct of persons who engaged in the white slave traffic within the boundaries of a sovereign state. It did not attempt such control in enacting Title 18, United States Code, Sections 2421 and 2422. Without regard to the social purpose of the white slave laws, Congress had power under the Constitution to regulate interstate commerce; but not to restrain immorality within any state. It therefore properly withdrew the facili-

ties of interstate commerce from those engaged in the white slave traffic without attempting to impose a moral code upon persons who did not use interstate commerce for their activities.

Title 18, United States Code, Section 2421, the first section of the White Slave Traffic Act, prohibits the transportation of women in interstate commerce for immoral purposes. *Bell* violated the provisions of that section by driving a car across a state line with two women passengers who were being carried to a place where they would engage in prostitution. The Court held that there was only one illegal transaction — the single crossing of the boundary.

The next section of the Act, Title 18, United States Code, Section 2422, makes it a crime to cause a woman to travel on the lines of common carriers in interstate commerce by persuasion, inducement, enticement or coercion. Appellant in this case was convicted of causing two distinct journeys in violation of that statute by persuading two women to make separate trips to different states. One woman was caused to go from the Northern Division of the Western District of Washington to a point in Oregon. The other was caused to travel from the same starting point to a place in Montana. Each woman made a trip which was entirely distinct from that made by the other. As

each entered upon her journey on a common carrier in interstate commerce, the appellant became guilty of a crime which had not been committed until that trip began.

The persuasion, no matter how successful it may have been, did not constitute any violation of Title 18, United States Code, Section 2422, until it caused transportation of a woman as a passenger upon the line or route of a common carrier in interstate or foreign commerce. The statutory language is clear and not subject to interpretation. Title 18, United States Code, Section 2422, provides first for the persuasion, inducement, enticement or coercion, then goes on to say, "and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce * * *."

If the women named in Counts IV and IX of the Indictment had been effectively persuaded by appellant but were prevented from reaching the lines of the common carriers by death, accident or other factor completely beyond their control, appellant would not have been guilty of any violation of Title 18, United States Code, Section 2422.

> "The constitutional basis of the statute is the withdrawal of 'the facility of interstate transportation,' *Hoke* v. *United States*, 227 U.S. 308, 322,

though, to be sure, the power was exercised in aid of social morality." *Bell* v. *United States*, 349 U.S. 81, 83.

Appellant argues that *United States* v. *Salidonas*, 93 F. 2d 302 (2 Cir. 1937), is authority to the contrary. He sets forth what purports to be a quotation from that case at page 11 of his brief. That alleged quotation tends to support his theory that the persuading, in and of itself, makes out the crime. The decision of the Court of Appeals in the *Salidonas* case does not appear to contain the words of the alleged quotation appearing at page 11 of appellant's brief. Somewhat similar language of radically different import appears at page 304 of the decision where the Court held:

> "The inducement sets in motion the successive acts that constitute the crime. It is unnecessary to show control of the medium of transportation by the inducer. It is sufficient if the accused knows or should have known that interstate transportation by common carrier would reasonably result *and if it does*." (Emphasis ours.)

Since there can be no crime of inducing a woman to travel on the lines of a common carrier for the purpose of prostitution unless such travel in fact occurs, the proof necessary to support the charge in either Count IV or IX of the Indictment would not justify conviction of the other. Each woman made

a separate trip to a different state and proof of one trip would not show the other. It therefore follows that each count alleged a different crime.

Morgan v. *Devine*, 237 U.S. 632, 35 S.Ct. 712, 59 L.Ed. 1153 (1915);

O'Brien v. *Squier*, 133 F. 2d 123 (9 Cir. 1943);

Halverson v. *United States*, 162 F. 2d 308 (9 Cir. 1947);

United States v. *Henry Lohrey Co., et al.*, 112 F. Supp. 69 (D.C. W.D. Pa. 1953).

IV.

CONCLUSION

Appellant has pleaded guilty to charges of causing different women to be transported as passengers upon the lines and routes of common carriers in interstate commerce as the result of his knowing, willful and unlawful persuasion, inducement and enticement. Each of the two crimes was committed when the transportation occurred, and not before. That transportation was on different lines and terminated in different states. The crimes were separate and distinct. Proof sufficient to sustain one charge would not, standing alone, justify conviction on the other. Each constituted a separate violation of Title 18, United States Code, Section 2422, which provides punishment for certain unlawful acts in interstate commerce

rather than for any course of conduct of a person engaged in the white slave traffic.

It is therefore respectfully urged that the action of the Court below in denying appellant's motion under Title 28, United States Code, Section 2255, was entirely proper and should be affirmed in all respects.

Respectfully submitted,

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